



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 18 OF 2014

(An appeal from the Judgment of the Ag. Senior Resident Magistrate,

Siakago in SPMCR. Case No. 248 of 2013 dated 4/4/2014)

J K.....APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Siakago Ag. Senior Resident Magistrate delivered on 4/4/2014. The appellant was convicted of the offence of defilement contrary to Section 8(1) read with 8(2) of the Sexual Offences Act and sentenced to serve life imprisonment.

In his petition of appeal and in the grounds of submissions the appellant raises the following grounds:-

1. *That the trial magistrate erred in convicting him on uncorroborated and inconsistent evidence.*
2. *That the court failed to take into account that a grudge existed between him and the mother of the complainant.*
3. *That the appellant was not taken for medical examination.*
4. *That the age of the complainant was not proved.*
5. *That his defence was rejected without a good cause.*

In his submissions the appellant argued that the prosecution's evidence was inconsistent. PW1 testified that the offence took place on 30/4/2013 while PW3 the complainant's mother said that it occurred on 4/5/2013 which was supported by the charge sheet. PW3 said that she was informed by PW4 her sister that the complainant had been defiled. The appellant argues that the witness denied having told PW3 that the child was defiled.

It was further submitted that the investigating officer said the appellant was arrested by members of public on 11/5/2013 while the charge sheet indicates he was arrested on 6/5/2013.

It was argued that the complainant was taken for medical examination 7 days after the incident and that age assessment was done one year later. The magistrate failed to consider that the appellant and PW3 had divorced and this led the witness framing the case against the appellant.

The appeal was opposed by the respondent through the submissions of the State Counsel Ms. Musango. She argued that the appellant was known to PW2 before the incident and that there was no problem in identification. The evidence of PW1 and

PW3 corroborated that of PW2. Any existing grudge between the appellant and PW3 was immaterial to the occurrence of the offence. During the trial the appellant did not raise the issue of the grudge and this allegation only surfaced during the appeal which was an afterthought.

The respondent submits that there was no legal basis for taking the accused person for medical treatment. He was arrested several days after the incident and any medical evidence would not have been available. The age of the complainant was proved through documentary evidence as 4-5 years. The charge sheet also indicates the complainant was 5 years. The section under which the appellant is charged requires that the complainant be the age of eleven years or below. It is the submission of the State that the age of the complainant was proved as required by the law.

The State submitted that the evidence of the prosecution was overwhelming and was not shaken by the defence of the appellant. The sentence imposed by the trial court was within the law.

The duty of the 1st appellate court was explained in the case of **NJOROGE VS REPUBLIC [1987] KLR 19** held:-

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it neither seen or heard the witnesses and to make due allowance in this respect”.

The evidence of PW1 the clinical officer at Mbeere District Hospital was that the complainant was examined by her colleague on 5/5/2013. PW1 examined her on 6/5/2013 and found some lacerations on the labia majora and a perforated hymen with the vagina reddened and had a foul smell and discharge. A vagina swab showed some red blood and pus cells. PW1 concluded that there was vaginal and rectal penetration. The age of the complainant was assessed as 4 ½ years. The P3 form was produced in evidence.

PW2 testified after the *voire dire* test was conducted due to her tender age. She told the court that she was in nursery school. It was her evidence that she knew the appellant who bought her soda on the material day. PW2 said that the appellant removed her clothes and slept on her while in the house near the store. The appellant had removed his trouser after undressing the complainant. She explained that he slept with her on the front and from behind causing her a lot of pain. PW2 told the court that she feels pain when urinating since the incident. She was taken to Embu Hospital for treatment.

PW3 testified that she lives with her mother and that on the material day she had left her children with her sister. The complainant who was aged 4 years was among her three children under the care of her sister. The witness further testified that the appellant was her husband for a period of five months before they parted. She said she was informed that the appellant had defiled her daughter in her absence. She examined PW2 and found that she had injuries in her vagina and was bleeding. The girl was unable to walk well and walked with her legs apart. PW3 reported the matter to the police.

The evidence of PW4 was that on 30/4/2013, PW3 her younger sister was admitted in hospital leaving her three children under her care. On 4/5/2013 at around 8.00 a.m. the appellant came to her house and informed her that he was going to see PW3 in hospital. He requested that the complainant accompanies him to the hospital. Both the appellant and the complainant did not come back home that day. The following morning PW3 was discharged from hospital and confirmed that the appellant did

not visit her in hospital the previous day as he had said he would. It was later in the day that the appellant brought the child back home. PW3 and PW4 examined the child and noticed that she had been defiled.

The case was investigated by PW5. He told the court that he referred the complainant to hospital and re-arrested the accused from members of public. He recorded statements from witnesses and later charged the appellant with the offence.

The appellant is charged with defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act. The section provides:-

Section 8(1)

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

Section 8(2)

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The appellant argued that there was contradiction regarding the evidence of the witnesses and on the date the offence was committed. The charge states that the offence was committed on 4/5/2013 at Kageri in Mbeere North District. PW4 under whose care PW2 was testified that the appellant took the complainant from her mother's home on 4/5/2013 and brought her back on 5/5/2013. The clinical officer testified that the complainant was examined by her colleague on 5/5/2013. It is very clear from the evidence of the prosecution witnesses that the offence was therefore committed between 4th and 5th of May, 2013. I therefore find no contradiction on the date that the offence was committed.

The appellant argued that there was contradiction on the date of arrest. The charge sheet indicates that the appellant was arrested on 6/5/2013. PW5 PC Mwangi testified that the appellant was arrested by members of public and handed over to him on 11/5/2013. The date given by PW5 is not correct and may be a topographical error. The appellant was arraigned in court on 7/5/2013 which was one day after arrest. The correct date of arrest is the one on the charge sheet being 6/5/2013. This is minor contradiction and does not affect the prosecution's case.

The appellant alleged that there was a contradiction as to how PW3 learned that her child had been defiled. PW3 testified that when she was discharged from hospital on 5/5/2013 she was informed by PW4 that the complainant had been taken away by the appellant the previous day. The complainant was brought back home by the appellant on 5/5/2013. PW3 and PW4 noticed that the complainant had a problem in walking and therefore investigated further and confirmed that she had been defiled. I find no contradiction between PW3 and PW4.

In regard to corroboration, Section 124 of the Evidence Act does not require that the evidence of a minor be corroborated except by medical evidence. However, in this case the evidence of PW1 the clinical officer, that of PW3 and PW4 provided sufficient corroboration. The evidence of PW2 was clear and consistent on what the appellant did to her. The evidence of the prosecution witnesses was clear that no other person had the custody of PW2 between 4th and 5th of May 2013. In his defence the appellant did not explain where he took PW2 overnight after lying to PW4 that he was going to see PW2's mother in hospital. PW3 upon being discharged from hospital denied that there was no such visit.

The evidence of independent witnesses including PW1, PW4 and PW5 dislodge the claim by the appellant that the case was framed against him by PW3 for the reason that the two had separated. The appellant did not raise the issue of any existing grudge between him and PW3 in his defence. His defence was indeed a mere denial which did not dislodge the overwhelming evidence of the prosecution.

It was alleged by the appellant that his defence was rejected without basis. In the judgment the learned trial magistrate stated that the chronology of the events surrounding the case pointed at the appellant as the only person in whose custody PW2 was when she was defiled. The appellant spent a whole day and night with PW2 in an unknown location. The magistrate sufficiently considered the defence of the appellant and found it not plausible.

The appellant further argued that he was not taken for medical examination. It is important to note that the appellant was arrested 2 days after the incident and that no evidence of a sexual offence would be found on a suspect or a complainant beyond 72 hours. There is no requirement that a suspect be taken for medical examination. There was sufficient evidence of penetration on the part of the complainant from the P3 form which was corroborated by other witnesses. It was not necessary that spermatozoa be present in order to prove penetration.

It was held in the case of *MARK OIRURI MOSE VS REPUBLIC [2013] eKLR* that the trial magistrate erred in finding that there was no presence of spermatozoa and hence he appellant could not be convicted of defilement. All that was required was prove of penetration of the victim's vagina with the appellant's penis.

In the case of *DENNIS OSORO OBIRI VS REPUBLIC [2014] eKLR* the appellant had contended that there was no medical evidence linking him to the defilement. The court held that such evidence was not necessary the moment the trial court found that there was sufficient medical evidence to prove that the complainant was defiled and that her evidence was trustworthy as to the identity of the person who defiled her.

The appellant argued that the age of the complainant was not proved. It was the testimony of PW3 the mother that PW2 was aged 4 years while PW1 the clinical officer gave the age as 5 years. The evidence of PW1 was that of an expert and was documented in the P3 form. There was no other evidence to controvert the evidence of PW1 which was sufficient prove of age. Moreover, it has been held in several court decisions that the evidence of a mother is sufficient to prove the age of a child.

In the case of *RICHARD WAHOME CHEGE VS REPUBLIC [2014] eKLR* it was held that proof of age is not only by way of documentary evidence. The evidence of the mother on age is also sufficient.

Section 8(2) of the Act provides for life imprisonment upon conviction where the victim is aged 11 years or less. The sentence imposed was within the law and should not be disturbed.

I find no merit in this appeal and I dismiss it accordingly. The conviction and sentence are hereby upheld.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Matere for respondent

Appellant